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In the Supreme Court of the United States

OCTOBER TERM, 1983

EUGENE SCHIAVONI, aka JOE FOMAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that omission of his name in an application and order for electronic surveillance required suppression of his statements intercepted during surveillance.

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and conspiring to commit that offense, in violation of 18 U.S.C. 371. The indictment charged, and the evidence showed, that petitioner was involved in the operation of crap games in the Eastern District of Pennsylvania over an extended period in 1978, and that he conspired with at least six other persons to conduct the games during that time. The case against petitioner was based in large measure on a number of tape-recorded conversations intercepted pursuant to court orders between April and June of 1978. Petitioner was sentenced

to a total term of eight years' imprisonment and a $5,000 fine (Pet. App. 5a-6a). The court of appeals affirmed (Pet. App. 3a-4a).

2. In the initial order authorizing electronic surveillance in this case, petitioner was listed among the persons whose oral and wire communications could be intercepted. C.A. App. 55a, 56a.[1] In addition, petitioner was listed among those who could properly be subjected to video surveillance at the location where the oral and wire interceptions were being conducted. C.A. App. 76a. In the applications for renewed electronic surveillance, the government submitted that there was probable cause to believe that petitioner was involved in the subject offenses, and that there was probable cause to believe that his *wire* communications would reveal evidence of these offenses. C.A. App. 90a. However, the government did not list petitioner as being among those whose *oral* communications were expected to reveal evidence of the offenses in question. *Ibid.* Accordingly, in the extension order, the district court authorized the interception of petitioner's wire communications and the use of video surveillance directed at petitioner (C.A. App. 105a-106a, 128a), but it did not include him in the oral communications portion of the order (C.A. App. 105a).[2]

In the course of the interceptions conducted under the renewal order, petitioner was overheard in both wire and oral communications. However, on each occasion on which petitioner's oral communications were overheard, he was speaking with a person who was named in the oral communications portion of the order. C.A. App. 160a, 184a-185a.

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[1]"Oral communications" means face to face conversations; "wire communications" means phone conversations (C.A. App. 164a).

[2]Several other persons were similarly identified in the wire, but not the oral, communications sections of the renewal application and order.

3. Petitioner does not contend that the interceptions in which he was overheard violated the surveillance order. Rather, his contention (Pet. 5) is that the government knew his oral communications were likely to be intercepted and that he therefore should have been named in that portion of the interception application and order. This claim is wholly insubstantial for two reasons.

a. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, requires that a surveillance application identify an individual if the government has probable cause to believe (1) that the individual is engaged in the criminal activity under investigation and (2) that the individual's conversations will be intercepted by the proposed electronic surveillance (18 U.S.C. 2518(1)(b)(iv)). *United States* v. *Donovan*, 429 U.S. 413, 423-428 (1977); *United States* v. *Kahn*, 415 U.S. 143 (1974). The statute further requires that under those circumstances, the court's interception order must also identify the individual (18 U.S.C. 2518(4)(a)). But if the government does not have probable cause to believe that the individual's conversations will be intercepted by the particular form of electronic surveillance that is being requested, the government is not required to name the individual in that part of the application. Cf. *United States* v. *Kahn*, 415 U.S. 143, 155 (1974). Likewise, the district court's order authorizing electronic surveillance need not name any individual if there is not probable cause to believe that his conversations will be intercepted by the particular form of surveillance under consideration.

Petitioner does not contend that the government had probable cause to believe that his face to face conversations relating to the subject offenses would be intercepted in the location for which the oral interception order was requested. He merely asserts (Pet. 6) that he was a target of the investigation and that his name was known to the government at

the time of the application in question. But that is clearly not enough to require naming him in the application or the order, or even to justify doing so; there must be probable cause to believe that his criminal communications will be overheard in the course of the particular surveillance at issue. Petitioner has failed to demonstrate that the government had that probable cause, yet nonetheless intentionally omitted his name from that portion of the surveillance application.[3]

The far more reasonable conclusion is that the government drafted its application cautiously — that it asserted that there was probable cause to believe petitioner's telephone conversations would be intercepted, but not his oral communications — for the simple reason that the government did not think that it had probable cause on the latter score.[4] If the government had had probable cause to believe petitioner's oral as well as wire communications would be intercepted, it would have had nothing to gain from including petitioner's name in the wire communication portion of the application, but omitting it from the oral communication portion. The fact that petitioner's oral communications were intercepted — in the course of his conversations with persons as to whom there was probable cause — is not sufficient to establish, retroactively, that the government should have expected to overhear petitioner in face to face communications at the surveillance site.

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[3]The fact that other targets were similarly treated makes it unlikely that the omission was an oversight.

[4]At the suppression hearing, the government attorney indicated that he did not know why petitioner was not identified in the oral communication portion of the application (C.A. App. 159a). When he attempted to obtain that information for the record from the FBI agent who supervised the surveillance (C.A. App. 163a-164a), petitioner's counsel objected (C.A. App. 186a), and the district court indicated that it was not interested in further testimony on the matter (*ibid.*; cf. C.A. App. 160a).

b. Even if the government did have probable cause to believe that petitioner's oral communciations would be intercepted, the failure to mention his name in the application or the order does not justify suppressing the evidence obtained under the authority of the order. *United States* v. *Donovan, supra*, 429 U.S. at 435-437. Petitioner apparently seeks (Pet. 6) to distinguish *Donovan* on the ground that that case focused on the contents of the interception application (18 U.S.C. 2518(1)(b)(iv)) and the inventory (18 U.S.C. 2518(8)(d)), rather than the contents of the interception order (18 U.S.C. 2518(4)). This distinction, however, is totally without force. The *Donovan* case, like this one, involved the question of what must appear in *both* an application and an order. See 429 U.S. at 435 ("the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization"); *id.* at 436-437 n.24. The Court focused on the application simply because, as the instant case demonstrates, if the application does not mention a particular individual, neither will the order. Therefore, if the failure to name a particular subject in the application cannot justify suppression, neither can the failure to name him in the order.[5]

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[5]Nor is there any merit to petitioner's suggestion (Pet. 6) that Title III provides more stringent identification requirements for surveillance subjects who are allegedly "principal targets" of the government's investigation. In the absence of probable cause to believe that an individual's incriminatory conversations will be intercepted, that individual need not be named in the surveillance application or authorization regardless of his status in the investigation. Cf. *United States* v. *Donovan, supra*, 429 U.S. at 423-428.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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